No. 09-1503

Supreme Court, U.S.
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In The

Supreme Court of the United States

THE CADLE COMPANY, et al.,

Petitioners,

v.

KERRY R. HICKS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent Kerry R. Hicks objects to the Questions Presented by Petitioners and, according to Supreme Court Rule 24, alternatively identifies the Question Presented as follows:

Whether the Tenth Circuit properly affirmed the District Court's finding that the Arbitrator had jurisdiction over the Petitioners and the claims in Phase II when (a) Petitioners agreed to and specifically requested arbitration; and (b) Petitioners are bound by a broad arbitration provision that encompassed the Phase II claims.

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STATEMENT OF THE CASE

I. GENESIS OF DISPUTE

In December 1999, Respondent Kerry R. Hicks and others entered into a promissory note with Bank of America ("BOA"), whereby Mr. Hicks committed to repay $2,000,000 of a $3,550,000 debt. ("Promissory Note" or "Note"). (Appendix to Appellants' Brief ("Aplt.App.") 107-11.) The Note contains a broad, mandatory arbitration provision ("Arbitration Provision"):

> ANY CONTROVERSY OR CLAIM BETWEEN OR AMONG THE PARTIES HERETO INCLUDING BUT NOT LIMITED TO THOSE ARISING OUT OF OR RELATING TO THIS INSTRUMENT, AGREEMENT OR DOCUMENT OR ANY RELATED INSTRUMENTS, AGREEMENTS OR DOCUMENTS, INCLUDING ANY CLAIM BASED ON OR ARISING FROM AN ALLEGED TORT, SHALL BE DETERMINED BY BINDING ARBITRATION. . . .

(Aplt.App. 110 ¶17.) The Note, by its own terms, was binding on BOA's successors. (*Id.* ¶15.)

On October 1, 2002, Petitioners The Cadle Company ("TCC") and Buckeye Retirement Co. LLC, Ltd. ("Buckeye") acquired the Note from BOA. (Aplt.App. 943-91.) Almost immediately, Petitioners pursued collection of the debt from Mr. Hicks, despite Mr. Hicks' payment in full of his obligation. Mr. Hicks denied liability and thoroughly explained his position

to Petitioners. (Aplt.App. 992-96.) BOA advised TCC and Buckeye that Mr. Hicks was not liable on the Note. (Aplt.App. 215.) TCC's internal investigation further confirmed that Mr. Hicks was not liable. (Appendix C to Petition (App. C) 55a-56a.) However, because they thought he could pay, and would pay if harassed, Petitioners sued Mr. Hicks in Tennessee federal court in violation of the Arbitration Provision. *Hicks v. Bank of Am.*, 218 F. App'x 739 (10th Cir. Feb. 21, 2007). Despite knowing Mr. Hicks had no liability, Petitioners began a systematic and calculated campaign to attempt to spur state and federal government authorities to prosecute Mr. Hicks for bank fraud and perjury, criminal allegations in which Petitioners had neither a "reasonable objective basis or subjective belief. . . ." (App. C 76a.)

II. THE ARBITRATION – PHASE I

On October 23, 2003, Mr. Hicks filed a Demand for Arbitration with J.A.M.S./Endispute in Denver, Colorado ("JAMS") against Petitioners TCC and Buckeye asserting claims related to their filing suit against Mr. Hicks in Tennessee in violation of the arbitration and venue provisions in the Note ("Phase I"). *See Hicks*, 218 F. App'x at 743. On September 27, 2004, less than one month before the arbitration hearing commenced, Petitioners wrongfully accused Mr. Hicks of criminal conduct, namely bank fraud, in letters sent to the Attorneys General of Colorado and Tennessee, designed to trigger the criminal prosecution of Mr. Hicks. (Aplt.App. 784-87.)

As a result of these criminal allegations, the arbitration hearing set to begin on October 4, 2004 was continued.

On December 3, 2004, Mr. Hicks filed a complaint in Colorado state court against BOA and Petitioners. (Appellee/Cross-Appellant's Supplemental Appendix ("Aplee.Supp.App.") 1-21.) The Complaint asserted claims identical to those pending in the arbitration, plus additional claims for defamation and outrageous conduct stemming from the false allegations of bank fraud Petitioners lodged with governmental authorities. (*Compare id. with* Aplt.App. 841-69.) On December 20, 2004, BOA removed the state court action to the United States District Court for the District of Colorado ("District Court") and simultaneously moved to stay the action during the ongoing arbitration before JAMS. (Aplt.App. 1-2; Aplee.Supp.App. 22-29.) The Petitioners joined BOA's motion to stay on January 4, 2005, stating that "***[t]his action must proceed to arbitration*** as the arbitration clause in the Promissory Note ***clearly encompasses all issues and claims*** asserted by Hicks." (Aplee.Supp.App. 33 (emphasis added).)

On January 13, 2005, Mr. Hicks filed an Amended Complaint with the District Court, which focused on his claims against these Petitioners. (Aplt.App. 315-22.) On January 14, 2005, the District Court stayed the action and ordered the parties to arbitrate all claims in the Amended Complaint. (Aplee.Supp.App. 51-53.) On January 25, 2005, Arbiter James D. Hinga confirmed that he had jurisdiction over the claims

asserted in Mr. Hicks' Amended Complaint, but bifurcated those claims to a subsequent proceeding ("Phase II"). (Aplt.App. 387 ¶6.) The Phase I claims were then tried to Arbiter Hinga on February 1-5, 2005. As a result of their illegal debt collection, Arbiter Hinga found in favor of Mr. Hicks on his abuse of process claim against Defendants TCC and Buckeye, holding:

> The conduct of [TCC] and/or Buckeye I find to be offensive. The filing of the lawsuit in Tennessee when you have a non-ambiguous arbitration clause shows a complete disrespect for the law. There was testimony that it is local practice to file a lawsuit first and then the defendant must file a pleading affirmatively alleging the arbitration clause. I do not find this persuasive. Indeed, [TCC employee] Harkless admitted that she knew that there was an arbitration clause in the note, but that gave her no pause. . . . I find that by filing this case in Federal Court in Tennessee, [TCC] and Buckeye abused the process and Court system. This award and all my awards shall enter against both [TCC] and Buckeye.
>
> The callousness of the actions of both Shaulis and Harkless on behalf of Buckeye and [TCC] is shocking. They had knowledge two months before the lawsuit was filed that [BOA] was of the opinion that Hicks was not responsible on the note. The evidence was certainly enough to put [TCC] and Buckeye on investigative notice, which they did as

> Harkless called [BOA officer] Choppin who said Hicks was not liable. Before purchasing the note, [TCC's] due diligence officer saw evidence in [BOA's] file that Mr. Hicks may not be liable under the note. They received a letter [from BOA's] attorney that said Hicks was not responsible, yet they went [forward] with their collection efforts in Court because the arbitration clause gave Harkless no pause.

(Aplt.App. 54-55.) *See also Hicks*, 218 F. App'x at 744.

On April 4, 2005, Arbiter Hinga awarded Mr. Hicks $415,587.36 in damages against TCC and Buckeye. (Aplt.App. 54-56.) On April 28, 2005, the Arbiter issued his Final Arbitration Award. (Aplt.App. 57.) On October 26, 2005, the District Court confirmed the Phase I Arbitration Award with respect to Mr. Hicks' claims against TCC and Buckeye. (Aplt.App. 60-64.) On February 21, 2007, the Tenth Circuit affirmed the Phase I confirmation orders. *Hicks*, 218 F. App'x at 739. Petitioners did not file a petition for writ of certiorari with respect to the Tenth Circuit's February 2007 Order. The District Court Clerk entered judgment in favor of Mr. Hicks for the Phase I claims on October 10, 2008. (Aplt.App. 37-38.)

III. THE ARBITRATION – PHASE II

On April 8, 2005, Mr. Hicks filed his Statement of Claims for Phase II, which set forth claims identical

to the Amended Complaint bifurcated from Phase I. (Aplt.App. 65-71.) Phase II of the arbitration was heard before Arbiter Hinga on February 28-March 3, 2006. Prior to issuing his ruling, however, Arbiter Hinga passed away. Retired Judge Frank N. Dubofsky was selected as the new arbitrator ("Judge Dubofsky" or "Arbitrator").

As Mr. Hicks learned during Phase II, Petitioners' initial letters to the Tennessee and Colorado Attorneys General were merely the beginning of Petitioners' efforts to destroy Mr. Hicks. The Petitioners continued their "relentless campaign to defame, intimidate and harass Hicks by raising alleged bank fraud, perjury and other serious allegations against Hicks before numerous other governmental and private bodies," and did so with the intent "to retaliate against Hicks for [Petitioners'] loss of a business relationship with BOA (which [Petitioners] caused), for contesting Cadle's position, for trying to force Hicks to compromise his civil claims in order to avoid criminal prosecution, and to intimidate others in the process." (App. C 57a (footnotes omitted).) Thus, Petitioners sent no less than eight letters to various government authorities and law enforcement agencies accusing Mr. Hicks of having committed bank fraud in relation to the Promissory Note and accusing Mr. Hicks of committing perjury by lying about bank fraud. (*See* App. C 56a-57a n.4.) Petitioners further perpetuated their defamatory scheme through oral communications with such authorities. (*Id.*)

A second hearing on Phase II was held October 10-12, 2006. Because "there was no bank fraud in this case," and because "the perjury claim is without merit and used to retaliate and intimidate Hicks," Judge Dubofsky found the letters and oral statements accusing Mr. Hicks of bank fraud and perjury to be defamatory. (App. C 60a, 66a-68a.) Judge Dubofsky further found Petitioners to have engaged in at least thirteen acts of outrageous conduct. (*Id.* at 69a-70a.) He explained:

> [T]he totality of the statements and actions of [Petitioners] constitute conduct that goes beyond all bounds of decency and is considered atrocious and intolerable in a civilized community. I have never seen a party to a lawsuit engage in such relentless, protracted and destructive conduct to harm another individual.

(*Id.* at 68a.)

Judge Dubofsky's findings were consistent with those of every judicial officer that considered Petitioners' conduct in this case. In granting Mr. Hicks' petition for a permanent civil protection order against Defendant Daniel C. Cadle, Jefferson County Court Judge Thomas Ettenberg found that Mr. Cadle used the arbitration process as a "subterfuge" to send communications designed to cause Mr. Hicks severe emotional distress. (Aplee.Supp.App. 103.) In addition, Mr. Cadle filed a derivative action against Mr. Hicks' employer, Health Grades, Inc., its Board of Directors, and senior management, based, in part,

upon a February 13, 2006 letter from Mr. Cadle to the Board demanding payment to TCC of $10.3 million. United States District Court Judge Richard Matsch found that Mr. Cadle's outrageous demand had "all the appearance of extortion." (Aplee.Supp.App. 110.)

On June 18, 2007, Judge Dubofsky entered his Final Award. (App. C 85a.) The Final Award awarded Mr. Hicks $1,910,000, consisting of $950,000 in compensatory and $960,000 in punitive damages, and ruled against Petitioners on their counterclaims. The Final Award further granted Mr. Hicks pre-award interest on compensatory damages from September 27, 2004, and post-award, prejudgment interest from the date of the Final Award through confirmation at 10% per annum, in accordance with Tennessee law. (*Id.*)

On July 23, 2008, the District Court confirmed the Phase III Final Award, except the award of interest on compensatory damages. (Aplt.App. 6-30.) On August 12, 2008, Mr. Hicks moved the District Court to certify as final its October 26, 2005 and July 23, 2008 Orders confirming the Phase I and II Final Awards, pursuant to F.R.C.P. 54(b), and for an award of post-award, prejudgment interest. (Aplee.Supp.App. 112-67.) The Petitioners opposed the motion. (Aplee.Supp.App. 168-72, 173-83.) On October 7, 2008, the District Court granted in part and denied in part Mr. Hicks' motion. (Aplt.App. 31-36.) The District Court certified the Phase I and Phase II confirmation orders as final, but denied Mr. Hicks' request for post-award, prejudgment interest.

On October 10, 2008, the Clerk entered final judgment. (Aplt.App. 37-38.)

Petitioners appealed the District Court's Judgment to the Tenth Circuit. Mr. Hicks also filed a Notice of Appeal, challenging only the District Court's failure to award post-award, prejudgment interest. The Tenth Circuit consolidated the cases on appeal. On December 7, 2009, the Tenth Circuit affirmed the District Court's confirmation of the Phase II Final Award and reversed the District Court's vacatur of post-award, prejudgment interest. (Appendix A to the Petition (App. A).) The Petition for Writ of Certiorari ("Petition") stems from the Tenth Circuit's December 2009 Order. This Court should reject Petitioners' attenuated arguments, which are only designed to delay the just resolution of Mr. Hicks' claims, and deny the Petition.

IV. THE ARBITRATION – PHASE III

During Phase II, Petitioner Cadle vowed "to continue to wage this malicious campaign against Hicks for the next ten years and beyond" and "to continue making such [false bank fraud] allegations even after the conclusions of this arbitration." (App. C 73a.) Consistent with this threat, Mr. Cadle sent more defamatory letters to additional governmental entities after Judge Dubofsky issued his Final Award. As a result, on July 20, 2007, Mr. Hicks moved the District Court for leave to file his Second Amended Complaint, seeking damages for these additional letters and other related false statements,

and to compel arbitration of the same. Retired Judge John Leopold served as the Arbitrator for Phase III, which was tried over eleven separate hearing days between August 10, 2009 and December 3, 2009. Judge Leopold found Mr. Cadle liable, again, for defamation and outrageous conduct, and awarded Mr. Hicks $1,250,000 in compensatory damages and $1,900,000 in punitive damages. The Phase III arbitration award currently is subject to motions to confirm and vacate before the District Court.

ARGUMENT

I. THIS CASE DOES NOT PRESENT A "COMPELLING REASON" TO GRANT THE PETITION.

This Court has recognized the importance of arbitration as an alternative form of dispute resolution. Cases like this one, which were tried and decided within the broad parameters of arbitral jurisdiction, do not present "compelling reasons" to grant a petition for writ of certiorari. The result here is consistent with this Court's decisions regarding arbitral jurisdiction. Furthermore, despite their transparent arguments to the contrary, Petitioners here are judicially estopped from contesting arbitral jurisdiction.

There are no "compelling reasons" for certiorari review. Supreme Court Rule 10 provides:

> A petition for writ of certiorari will be granted only for compelling reasons. The

> following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . ;
>
> (c) a . . . United States court of appeals has decided an important question of federal law that has not been, but should be settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Petitioners assert the Court should grant the Petition because: (1) the Tenth Circuit's decision purportedly conflicts with the Court's recent decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corporation*, 559 U.S. __, 130 S.Ct. 1758 (April 27, 2010); (2) the Tenth Circuit allegedly disregarded *Litton Financial Printing Division v. NLRB*, 501 U.S. 190 (1991); and (3) supposedly there is a circuit split regarding application of the *Litton* test. None of these bases warrant further review by this Court.

II. THE TENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH *STOLT-NIELSEN*.

On April 27, 2010, this Court decided *Stolt-Nielsen S.A. v. AnimalFeeds International Corporation*, 559 U.S. ___, 130 S.Ct. 1758 (April 27, 2010). Petitioners argue that this Court should grant their Petition because the Tenth Circuit's decision purportedly conflicts with new precedent established by *Stolt-Nielsen*. *Stolt-Nielsen*, however, merely reemphasizes the existing doctrine of this Court regarding arbitrability of disputes. It does not create new law. Furthermore, the Tenth Circuit's decision does not conflict with the *Stolt-Nielsen* decision.

A. *Stolt-Nielsen* Did Not Create New Law And The Tenth Circuit Applied This Court's Principles of Arbitrability.

While arguing that *Stolt-Nielsen* creates new law, Petitioners simultaneously admit that *Stolt-Nielsen* merely "reaffirmed that arbitration is a matter of consent, not coercion." (Petition ("Pet.") 22.)[1] This Court acknowledged as much in the *Stolt-Nielsen* opinion: "***[W]e have said on numerous occasions*** that the central or 'primary' purpose of the FAA is to ensure

[1] Accordingly, Petitioner's request that this Court grant certiorari, vacate the judgment below, and remand for further consideration (GVR) should be denied as *Stolt-Nielsen* does not create new precedent. (Pet. 23.)

that 'private agreements to arbitrate are enforced according to their terms.'" *Stolt-Nielsen*, 130 S.Ct. at 1773 (quoting *Volt Inf. Scis., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995)) (emphasis added). This Court continued, "[w]e think it is also clear ***from our precedents*** and the contractual nature of arbitration that parties may specify ***with whom*** they choose to arbitrate their disputes." *Id.* at 1774 (first emphasis added). While *Stolt-Nielsen* took on unique issues involving maritime law and class arbitration, it did not change the fundamental principles regarding arbitrability of disputes that this Court has articulated time and again.

In its decision, the Tenth Circuit acknowledged and applied this long-standing precedent. The Tenth Circuit stated:

> As the parties are well aware, we begin with the strong federal policy, evinced by the FAA, in favor of arbitration for resolving disputes. But "the FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995); [additional citations omitted]. Because "arbitration is a matter of contract, . . . a party cannot be required to submit to arbitration any dispute which he has not agreed to submit."

(App. A 9a (citation omitted).) The Tenth Circuit ultimately concluded that Petitioners were parties to the Promissory Note and agreed to arbitrate the Phase III claims under the Arbitration Provision. The terms of the Note clearly and unambiguously state that it binds the "parties hereto" and their successors. (Aplt.App. 110 ¶15.) That Petitioners disagree with the Tenth Circuit's rationale certainly does not justify this Court's grant of the Petition.

B. This Case Does Not Run Afoul of *Stolt-Nielsen*.

The circumstances of this case vary markedly from those in *Stolt-Nielsen*. In this case, it has been determined repeatedly that Petitioners are judicially estopped from contesting arbitral jurisdiction. (*See, e.g.*, Aplt.App. 45-50; App. A 9a-11a, Appendix B to Petition (App. B) 34a-36a.) *See also Hicks*, 218 F. App'x at 746. Petitioners asked the District Court to compel arbitration of the claims Mr. Hicks asserted in his Amended Complaint. Specifically, Petitioners stated: "This action must proceed to arbitration as the arbitration clause in the Promissory Note clearly encompasses all issues and claims asserted by Hicks." (Aplee.Supp.App. 33.) Those claims included the tort claims of defamation and outrageous conduct Mr. Hicks ultimately succeeded upon in Phase II. Having asked the District Court to compel arbitration, Petitioners cannot now argue that the Arbitrator lacked jurisdiction over those claims.

This issue was raised before and resolved by the District Court in March 2005, when the District Court clarified its Order compelling arbitration, and again in the District Court's order confirming the Phase II arbitration. (Aplt.App. 45-50; App. B 36a-37a.) The issue was further raised before and resolved by the Tenth Circuit in its decision affirming the Phase II confirmation. (App. A 9a-11a.) This is the law of the case. *Arizona v. California*, 460 U.S. 605, 618 (1983). Petitioners consented to arbitration of the Phase II claims and are judicially estopped from contesting arbitral jurisdiction now.

Stolt-Nielsen involved "class arbitration," not judicial estoppel. The bedrock of that decision and the bedrock of the Tenth Circuit's decision here do not conflict in the slightest. Thus, there is no basis to grant the Petition based upon a purported conflict with precedent of this Court.

1. Petitioners Are Judicially Estopped From Contesting Arbitral Jurisdiction.

Petitioners attempt to avoid the consequences of their affirmative representation by first arguing that judicial estoppel is not a ground for compelling arbitration under the FAA. (Pet. 28.) Petitioners' argument misses the mark. In this case, application of judicial estoppel does not provide an independent ground outside the FAA justifying arbitral jurisdiction. Instead, by joining in BOA's motion to stay

proceedings pending resolution of Arbitration, Petitioners expressly acknowledged the existence of the written arbitration agreement and consented to arbitral jurisdiction. Section 3 of the FAA provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, ***shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement***. . . .

9 U.S.C. § 3 (emphasis added). If Petitioners did not believe a written arbitration agreement existed that covered the claims and parties in issue, they would not have moved the District Court to stay the proceedings pending arbitration. Thus, Petitioners voluntarily and consensually agreed to arbitrate their dispute with Mr. Hicks under the written arbitration agreement. Judicial estoppel merely prevents Petitioners from later changing their position.

Petitioners next argue that the requirements of judicial estoppel were not met because, according to Petitioners, a "party can be bound to a prior position only if the 'party's later position [is] "clearly inconsistent" with its earlier position.'" (Pet. 28.) Petitioners cite *New Hampshire v. Maine*, 532 U.S. 742

(2001) to support their argument. Again, Petitioners are wrong.

First, this Court in *New Hampshire* actually held that "the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle," and then identified a number of potential considerations, including "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 750-51. The Court summarized its analysis:

> In enumerating these factors, we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts. In this case, we simply observe that the factors above firmly tip the balance of equities in favor of barring New Hampshire's present complaint.

Id. at 751.

The District Court and the Tenth Circuit articulated their rationale for applying judicial estoppel in this case, which included consideration of unfair advantage and unfair detriment. As the District Court explained:

> . . . Defendants' statement that this action must proceed to arbitration in essence requested the Court to compel the parties to

> arbitrate. By making the request, all Defendants consented to the jurisdiction of the arbitrator for resolution of all claims set forth in the Amended Complaint. In staying this action, the Court relied on this consent so that, as requested by Defendants, all claims among the parties to this action could be arbitrated. Therefore, judicial estoppel precludes any of the Defendants from claiming they are not subject to the arbitrator's jurisdiction for resolution of the claims in the Amended Complaint.
>
> * * *
>
> Finally, if not estopped, Shaulis and Cadle would "derive an unfair advantage or impose an unfair detriment on" Plaintiff by delaying Plaintiff's right to proceed against them in this action without further delay.

(Aplt.App. 47.) The Tenth Circuit further explained:

> In our decision affirming the first phase of arbitration, we noted that defendants waived any objection to arbitration and were estopped from asserting that the arbitrator lacked jurisdiction because they had stated, when they joined Bank of America's motion for stay, that this action must be arbitrated. *See Hicks*, 218 F. App'x at 746. This is the law of the case. *See Homans v. City of Albuquerque*, 366 F.3d 900, 904 (10th Cir. 2004) ("In general, the law of the case doctrine provides that when a court decides upon a rule of law, that decision should continue to govern the

> same issues in subsequent stages in the same case." (quotation omitted)).
>
> To the extent that all of defendants' objections to judicial estoppel were not before us in the prior appeal, we conclude, based on defendants' request for arbitration of the claims raised in the amended complaint, that they are judicially estopped from asserting that the arbitrator lacked jurisdiction over this appeal. *See New Hampshire v. Maine*, 532 U.S. 742, 749-51 (2000) (discussing judicial estoppel).

(App. A 11a-12a.) These reasons are sound.

Second, Petitioners clearly take a position now that is inconsistent with their prior position – they previously requested arbitration of the Phase II claims and now argue that there is no jurisdiction for the Arbitrator to hear the Phase II claims. The District Court explained:

> The refusal of Shaulis and Cadle to submit to the jurisdiction of the arbitrator is clearly inconsistent with the position they took earlier in their Joinder. They succeeded in persuading the Court to accept their position that the arbitration provision encompassed the claims against them; therefore, sustaining their inconsistent position before the arbitrator would create the perception that either the Court or the arbitrator have been misled.

(Aplt.App. 47.)[2] Moreover, Petitioner's prior position was not the result of inadvertence or mistake. Petitioners affirmatively filed a request that the District Court stay proceedings pending resolution of arbitration. (Aplee.Supp.App. 30-35.) Although Petitioners may now regret their decision, they cannot unwind it just because they lost the arbitration. The District Court and the Tenth Circuit appropriately applied judicial estoppel and/or law of the case here.

2. Respondents Were Bound By The Promissory Note.

Petitioners argue that compelling arbitration in this case violates the principles articulated in *Stolt-Nielsen* because (1) Mr. Cadle and Mr. Shaulis were never parties to the Arbitration Provision (Pet. 26-27); and (2) none of the Petitioners were parties when they engaged in the defamatory and outrageous conduct giving rise to Phase II (Pet. 25.)

The Petitioners' efforts to create a conflict between precedent addressing class arbitration and a case involving a promissory note, where every party was a holder, signatory, or agent of a holder or

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[2] Petitioners make reference to an attempt to later clarify their joinder. Once an objection to an arbitrator's jurisdiction is waived, however, it cannot be reasserted. *See Nghiem v. NEC Elecs., Inc.*, 25 F.3d 1437, 1440 (9th Cir. 1994) ("Once a claimant submits to the authority of the arbitrator and pursues arbitration, he cannot suddenly change his mind and assert lack of authority.").

signatory, strains credulity. As discussed above, each of the Petitioners voluntarily submitted to the jurisdiction of the Arbitrator for the Phase II claims by virtue of their affirmative efforts to compel arbitration of Mr. Hicks' Amended Complaint. Thus, whether any individual Petitioner was or is currently a party to the Promissory Note is of no consequence – they cannot now contest the jurisdiction of the Arbitrator. However, even if Petitioners were not judicially estopped from challenging arbitral jurisdiction, they are bound by the Arbitration Provision in the Promissory Note nonetheless.

Mr. Hicks and BOA became bound by the Note's broad Arbitration Provision when they executed the Note. Pursuant to the Note's express terms, the Arbitration Provision is binding upon BOA's successors. (Aplt.App. 110 ¶15.) Thus, TCC and Buckeye are bound by the Arbitration Provision as BOA's successors. Mr. Cadle and Mr. Shaulis are also bound by the Arbitration Provision in the Promissory Note as agents of TCC and Buckeye.[3] As the Tenth Circuit properly recognized (App. A 11a), "nonsignatories of arbitration agreements may be bound by the agreement to arbitrate under ordinary contract and agency principles." *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1281 (6th Cir. 1990); *see also Pritzker v. Merrill Lynch, Pierce, Fenner & Smith*, 7 F.3d 1110, 1121 (3d

[3] It is uncontested that TCC and Buckeye were parties to the Promissory Note for some period of time, either directly or as alter egos of one another.

Cir. 1993). While it is true that both the cases cited by the Tenth Circuit involved an attempt by the non-signatory to compel arbitration of claims against it, the courts in those cases did not make the distinction Petitioners argue now – namely, that agency principles only bind agents to arbitration provisions when the agents seek to invoke arbitration. *Arnold* and *Pritzker* said no such thing.

The case Petitioners cite in the Petition does not reach this conclusion either. In *Bel-Ray Company v. Chemrite Limited*, 181 F.3d 435 (3d Cir. 1999), the court first recognized the general principle that, "[w]hen asked to enforce an arbitration agreement against a non-signatory, we ask whether he or she is bound by that agreement under traditional principles of contract and agency law." *Id.* at 444. The court then articulated the issue before it as "whether an employee or agent who did not agree to arbitrate can be compelled to arbitrate his personal liability on the basis of a commitment made by the corporation he serves." *Id.* at 445. The court ultimately concluded that, based on the facts before it, agency and contract principles did not bind the agent to the arbitration provision for determination of his personal liability. *Id.*

In contrast, Mr. Cadle and Mr. Shaulis were not compelled to arbitrate personal liability based solely on a commitment made by their corporate principal. Instead, Mr. Cadle and Mr. Shaulis themselves made the commitment to arbitrate. (Aplee.Supp.App. 30-35.) Moreover, Mr. Cadle and Mr. Shaulis can be

bound by traditional principles of contract and agency law.

Before the District Court entered its March 23, 2005 Order on arbitral jurisdiction, Petitioners, including Mr. Cadle and Mr. Shaulis individually, represented to the Court: "Hicks has failed to plead, nor can he show, that Mr. Shaulis and Mr. Cadle, if they performed any acts complained of by Hicks . . . , were performing such acts outside their representative capacity." (Aplt.App. 1164.) Thus, according to Petitioners, any acts Mr. Cadle and Mr. Shaulis performed were acts performed as agents of TCC and Buckeye and were subject to the Arbitration Provision. As a result, the District Court explained:

> Although Shaulis and Cadle were never parties to the promissory note containing the arbitration provision, the Court may determine whether that provision extends to them for acts performed in their capacity as officers or agents of The Cadle Company.
>
> * * *
>
> Although Plaintiff did not agree explicitly to arbitrate his claims against Shaulis and Cadle, he may not avoid the consequences of agreeing to arbitrate claims against The Cadle Company by naming them as parties for acts they may have taken as its agents. . . .

(Aplt.App. 46-49.) In confirming the Phase II Arbitration and rejecting Petitioners' jurisdictional challenges, the District Court quoted its March 23, 2005

Order. (App. B 34a-36a.) The Tenth Circuit further concluded:

> Also, defendants contend that Mr. Shaulis and Mr. Cadle were never parties to the note. While this is true, they joined the motion for a stay and requested that all claims be decided by arbitration. Also, under the circumstances presented here, the two are bound by the arbitration clause as agents of The Cadle Company and Buckeye.

(App. A 11a.) Based on the record, the District Court and the Tenth Circuit properly concluded that Mr. Cadle and Mr. Shaulis are bound by the Arbitration Provision as agents of TCC and Buckeye.

Moreover, all Petitioners are bound by the Arbitration Provision notwithstanding the timing of Petitioners' tortious acts. The Arbitration Provision begins: "Any controversy or claim between or among the parties hereto. . . ." (Aplt.App. 110 ¶15.) "Hereto" simply means "to this writing or document." *Webster's 3d New Int'l Dict.* 1059 (1993). Hence, the plain language of the Arbitration Provision places no temporal limit on when the parties have to be parties in order to invoke the Arbitration Provision. If it had been the intent of the parties to so limit the scope of the Arbitration Provision, it could have read: "Any controversy or claim between or among the current holder and borrower of this instrument. . . ." No such limitation exists. Indeed, as set forth *infra*, Section III(A), the Arbitration Provision survives assignment or payment in full of the Promissory Note.

3. The Arbitration Provision Encompasses the Phase II Claims.

Petitioners argue that the Tenth Circuit erred in affirming the District Court's confirmation of the Phase II Arbitration Award because, under *Stolt-Nielsen*, the parties never agreed to arbitrate this dispute. (Pet. 25.) Petitioners further assert that the Tenth Circuit erred in agreeing with the District Court that the Arbitrator properly permitted Mr. Hicks to amend his Statement of Claims to include additional facts he discovered after he filed his Statement of Claims but before the close of evidence in Phase II, arguing that Petitioners did not agree to arbitrate virtually identical future transgressions. (Pet. 30.)[4]

The instant case varies greatly from *Stolt-Nielsen*. In *Stolt-Nielsen*, the parties stipulated that their arbitration agreement was "silent" with respect to class arbitration and, more importantly, the parties agreed that "when a contract is silent on an issue there's been no agreement that has been reached on that issue." 130 S.Ct. at 1766. With these parameters,

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[4] Petitioners continue to state that, by granting Mr. Hicks' motion to conform the pleadings to the evidence, the Arbitrator permitted Mr. Hicks to add ***claims***. (Pet. 30.) To be clear, the amendment did not add any additional claims – the claims alleged were abuse of process, defamation, and outrageous conduct both before and after the amendment. (*Compare* Aplee.Supp.App. 1-21 *with* Aplt.App. 315-322.) Rather, the amendment allowed the Arbitrator to consider additional ***facts*** that had come to light since Mr. Hicks filed his Statement of Claims.

the parties submitted the question of whether class arbitration was permitted to a panel of three arbitrators. *Id.* at 1765. Thus, there was no opportunity for the arbitration panel in *Stolt-Nielsen* to interpret the arbitration provision and ascertain the parties' intent regarding class arbitration – the parties had already stipulated they had no intent. *Id.* at 1770. The particular language of the arbitration provision "was quite beside the point." *Id.* Ultimately, in reaching its conclusion that class arbitration was permitted, the arbitration panel ignored the arbitration provision altogether and imposed on the parties its view of sound policy. *Id.* at 1768-69.

Here, the parties do not agree about the scope of the Arbitration Provision.[5] In such case, the District Court had to interpret the language of the Arbitration Provision as it would any other contract to determine the parties' intent. *Stolt-Nielsen*, 130 S.Ct. at 1773-74. A review of the plain language of the Arbitration Provision makes clear that Petitioners expressly agreed to arbitrate the Phase II claims. Unlike *Stolt-Nielsen*, the Arbitration Provision is not silent about whether Mr. Hicks' tort claims were arbitrable. The Arbitration Provision provides, in relevant part: "Any

[5] Petitioners continue to argue that Mr. Hicks agreed the Phase II claims were not arbitrable because Mr. Hicks initially made certain unsuccessful legal arguments regarding whether his tort claims should be arbitrated. (*See, e.g.*, Pet. 25.) Mr. Hicks lost those arguments. The District Court sided with Petitioners and determined the claims were arbitrable. This is the law of the case. *Arizona*, 460 U.S. at 618.

controversy or claim between or among the parties hereto including but not limited to those arising out of or relating to this instrument . . . including any claim based on or arising from an alleged tort, shall be determined by binding arbitration. . . ." (Aplt.App. 110 ¶15.) Thus, the parties expressly agreed to arbitrate ***any controversy or claim between them*** **including,** ***but not limited to***, claims arising out of the Note and claims arising from tort.

The lower courts reasonably interpreted the broad Arbitration Provision to cover Mr. Hicks' Phase II claims against Petitioners, which were tort claims for defamation and outrageous conduct. Both claims were based on Petitioners' relentless allegations that Mr. Hicks engaged in bank fraud in relation to the Promissory Note and/or perjury regarding his alleged bank fraud. As the Tenth Circuit reasoned: "The assertion that Mr. Hicks committed perjury by arguing that he did not commit bank fraud directly relates to the issues in arbitration and therefore was within the arbitrator's authority to arbitrate." (App. A 13a.) Thus, the Phase II claims are tort claims that relate to and arise out of the Note. They are expressly covered by the Arbitration Provision.

Moreover, the Arbitrator's decision to permit Mr. Hicks to amend his Statement of Claims to conform to the evidence presented at the hearing was a procedural decision well within his discretion and does not alter the parties' arbitration agreement. This Court explained:

> In certain contexts, it is appropriate to presume that parties that enter into an arbitration agreement implicitly authorize the arbitrator to adopt such procedures as are necessary to give effect to the parties' agreement. Thus, we have said that "'"procedural" questions which grow out of the dispute and bear on its final disposition' are presumptively not for the judge, but for an arbitrator, to decide."

Stolt-Nielsen, 130 S.Ct. at 1775 (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964))). As the Court determined, inferring authority for class arbitration into an arbitration provision otherwise silent on the issue fundamentally changes the nature of the arbitration in such a way that the parties cannot be presumed to have consented simply by entering into an arbitration agreement. *Stolt-Nielsen*, 130 S.Ct. at 1775-76. Given the major differences between bilateral and class arbitration, the decision of the arbitration panel in *Stolt Nielsen* ***substantively*** altered the parties' agreement to arbitrate. *Id.*

In stark contrast, the parties here expressly agreed to arbitrate tort claims between them related to the note. (Aplt.App. 110 ¶17.) By permitting the amendment to conform to the evidence, the Arbitrator made a purely procedural determination that fell well within his discretion. The Arbitrator merely accepted for consideration additional post-demand facts that lend further support to the tort claims the parties

agreed to arbitrate. His decision does not fundamentally change the nature of the arbitration. Citing the same cases this Court quoted in *Stolt-Nielsen*, the Tenth Circuit astutely recognized this distinction and held: "The arbitrator had discretion to allow Mr. Hicks to amend his statement of claims to conform to the evidence." (App. A 12a-13a.) Accordingly, the Arbitrator had jurisdiction to consider the additional facts in support of Mr. Hicks' claims.

Stolt-Nielsen did not create new law. Even so, the Tenth Circuit's decision does not conflict with *Stolt-Nielsen* or the long-established precedent that arbitration is consensual. This Court should deny the Petition.

III. THE TENTH CIRCUIT DID NOT DISREGARD *LITTON*.

Petitioners argue that this Court should grant their Petition because the Tenth Circuit allegedly disregarded the postexpiration arbitration jurisdiction analysis set forth in *Litton Financial Printing Division v. NLRB*, 501 U.S. 190 (1991). First, the Tenth Circuit did not even need to reach a *Litton* analysis because the Promissory Note in issue and its attendant Arbitration Provision did not "expire." The Arbitration Provision in the Promissory Note survives and properly subjects Petitioners to arbitral jurisdiction. Second, while the Tenth Circuit did not analyze each of the *Litton* factors, it nonetheless applied the *Litton* analysis in upholding arbitral jurisdiction in

this case. At most, however, these assertions of error amount to an argument that the Tenth Circuit misapplied a properly stated rule of law. That does not provide a basis for this Court's review. S. Ct. R. 10. Accordingly, the Petition should be denied.

A. *Litton* Does Not Apply Because This Is Not A Postexpiration Case.

The Note's arbitration provision is very broad and includes "any controversy or claim . . . including but not limited to those arising out of or relating to this instrument, including any claim based on or arising from an alleged tort. . . ." (Aplt.App. 110 ¶17.) It cannot be disputed that the Phase II claims, which concerned Petitioners' lodging of defamatory criminal allegations against Mr. Hicks regarding his alleged obligations under the Note, concern "any controversy . . . arising out of or relating" to the Note. *See Local 5-857 Paper, Allied-Indus., Chem. & Energy Workers Int'l Union v. Conoco*, 320 F.2d 1123, 1126 (10th Cir. 2003) (finding that where there is a "broad arbitration clause" that unless there is an "express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail" (internal quotations omitted)). Arbiters Hinga and Dubofsky expressly found that the malicious letter writing campaign was part of the collection activities in which Petitioners have engaged. (Aplt.App. 55; App. C 69a.) In finding that the Arbitration Provision

covered the Phase II claims, the District Court explained:

> Although The Cadle Company no longer holds the Note, the arbitration provision survives the expiration of the Note, and the parties' dispute concerning Plaintiff's liability on the Note and Defendants' efforts to collect on it was the genesis of, and is factually intertwined with, Defendants' letter-writing campaign against Plaintiff which is the subject of Plaintiff's tort claims.

(App. B 37a.)

The Promissory Note at issue here and the collective bargaining agreements ("CBAs") at issue in *Litton* and its progeny are very different contracts. The CBAs expire by their express terms – they are only valid contracts until a fixed date after which they have no effect whatsoever.

In contrast, the Promissory Note does not have a provision whereby it expires, thus relieving all parties of their obligations. (*See* Aplt.App. 107-11.) Rather, the Note's provisions, by their very terms, continue to apply to the future tortious conduct.[6] Parties seeking to avoid such an expansive provision may: (1) not buy the Note; or (2) refrain from

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[6] Petitioners claim that the operative portions of the Note confirm that Mr. Hicks committed bank fraud and support the alleged truth of their allegations to numerous governmental authorities and law enforcement agencies.

committing tortious acts that have their genesis in the Note. But, if one buys the Note and is steadfastly determined to commit torts against other parties to the Note, one cannot avoid the expansive agreement to arbitrate. Selling the Note is not equivalent to expiration. The terms of the Note do not relieve past holders of the obligation to arbitrate.

Thus, this is not a postexpiration case to which *Litton*'s limitations apply. The Tenth Circuit recognized as much because it did not rely heavily on *Litton* in reaching its conclusion that the dispute was arbitrable.

B. Even Assuming *Litton* Applies, The Dispute Is Arbitrable.

Even assuming the Promissory Note "expired" when Mr. Hicks was relieved of liability and/or when Petitioners sold the Note back to BOA, the Tenth Circuit properly applied the *Litton* test to uphold arbitral jurisdiction. The Tenth Circuit was aware of and even cited to *Litton* in its Order and Judgment, acknowledging the general presumption that all doubts are resolved in favor of arbitrability. (App. A 9a (citing *Litton*, 501 U.S. at 209).) The Tenth Circuit further endorsed this Court's rationale as stated in *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643 (1986), that when an agreement contains a broad arbitration clause, there is a presumption of arbitrability – an order to arbitrate should not be denied unless "it may be said with positive

assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." (App. A 9a (quoting *AT&T Techs.*, 475 U.S. at 650).)

In *Nolde Brothers, Inc. v. Bakery Workers*, 430 U.S. 243, 255 (1977), this Court also found a presumption in favor of postexpiration arbitration unless "negated expressly or by clear implication." Recognizing that the *Nolde Brothers* presumption "is limited to disputes arising under the contract," the Court explained when a postexpiration grievance could be said to arise under the collective bargaining agreement:

> [1.] where it involves facts and occurrences that arose before expiration, [2.] where an action taken after expiration infringes a right that accrued or vested under the agreement, or [3.] where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement.

Litton, 501 U.S. at 206.

In affirming the District Court, the Tenth Circuit found that the dispute here arose from actions "directly tied to the note." (App. A 10a.) The Tenth Circuit explained that the Petitioners' "continuous course of wrongful conduct was so related to the Note that resolution of the issue of Petitioners' liability for the claims asserted could not be determined independent of the Note." (*Id.*) This is exactly the analysis

Litton requires. 501 U.S. at 205-06. To assert that the Tenth Circuit did not apply the proper rule of law merely because the opinion did not walk step-by-step through each of the three *Litton* factors ignores the Tenth Circuit's rationale and elevates form over substance.

Analyzing the *Litton* factors confirms that the Phase II claims were properly subject to arbitration in this case. As to the first factor, the Phase II claims "involve[] facts and occurrences that arose before expiration." *Litton*, 501 U.S. at 206. Petitioners contend that the underlying transaction involved bank fraud. That underlying transaction occurred before Petitioners sold the Note.

As to the second factor, Mr. Hicks had a right to be free from unfounded and malicious allegations of bank fraud at the time he signed the Note.[7] The actions taken by Petitioners after they sold the Note infringed upon that right. As Judge Dubofsky found:

> I find that there was no bank fraud in this case.
>
> * * *
>
> Because Hicks did not commit bank fraud, and since I found that none of his statements constitute perjury, the contention of the

[7] Petitioners alleged that Mr. Hicks engaged in bank fraud regarding his obligations under the Promissory Note and that Mr. Hicks committed perjury by lying about committing bank fraud

> [Petitioners] that Hicks committed the crime of perjury are also defamatory.
>
> * * *
>
> I conclude that [Petitioners] did not have either a reasonable objective basis or subjective belief in the truth of the allegations of bank fraud or perjury.

(App. A 60a, 67a, 76a-77a.)

As to the final factor, there is no expiration date. As discussed *supra*, Section III(A), under normal principles of contract interpretation, a party cannot buy the Note, commit torts based upon the note, and then claim that the Arbitration Provision does not bind it.

Even if the Tenth Circuit erred in its application of *Litton*, however, such an error would not justify this Court's grant of certiorari. Misapplication of a properly stated rule of law rarely warrants Supreme Court review, particularly in a case such as this where the facts and circumstances so clearly support arbitral jurisdiction on numerous grounds. Sup. Ct. R. 10.

IV. THERE IS NO CIRCUIT SPLIT REGARDING APPLICATION OF THE *LITTON* TEST.

Petitioners argue that this Court should grant their Petition because supposedly there is a circuit split among the United States courts of appeals

regarding application of the post-expiration arbitration jurisdiction test outlined in *Litton*. 501 U.S. at 205-06. Analysis of these cases, however, reveals they are consistent with one another and with *Litton*. The *Litton* test is a fact-intensive test that focuses on pre-expiration conduct. The decisions by the Sixth, Eighth, and Ninth Circuits applying *Litton* recognize and apply that fundamental tenet. There is no circuit split here for the Court to resolve.

Furthermore, even if there was a split among the circuits in the context of their review of pre-expiration conduct in a collective bargaining agreement case, a case involving a promissory note that contains no expiration provision is not an appropriate case to further develop and refine the body of law governing CBAs.

In *Trinidad Corp. v. National Maritime Union of America*, 81 F.3d 769 (8th Cir. 1996), the Eighth Circuit determined whether grievances filed after the expiration of a collective bargaining agreement were subject to the agreement's arbitration clause. In so doing, the Eighth Circuit acknowledged and applied *Litton*. *Id.* at 772-73. Because no one argued that the right to arbitrate vested under the agreement and because the agreement did not explicitly provide that its arbitration provision survived expiration, the court limited its *Litton* inquiry to "determining whether any of the facts and circumstances leading to the relevant grievances arose before termination." *Id.* at 773. The parties agreed that the facts underlying two of the grievances arose after the expiration date.

The Eighth Circuit determined those claims were not arbitrable. *Id.* The parties disagreed, however, as to when the facts underlying the other two grievances arose. The Eighth Circuit concluded it could not make that determination based upon the record before it and remanded to the district court to conduct the factual inquiry necessary to resolve the case. *Id.* The Eighth Circuit gave the following instruction: "If the ***relevant*** events occurred before expiration, then the grievances arose under the agreement and are subject to arbitration." *Id.* (emphasis added).

The Eighth Circuit's holding cannot be read as expansively as Petitioners would suggest. (Pet. 19.) The Eighth Circuit's instruction makes sense – events irrelevant to the dispute should not affect whether the dispute is arbitrable. Thus, the Court must determine that relevant events underlying the dispute occurred before expiration. This decision comports entirely with *Litton's* requirement that the post-expiration dispute involve facts and occurrences that arose before expiration. *Litton*, 501 U.S. at 206. The gloss of "relevancy" is implicit in this Court's decision – the Eighth Circuit did not alter *Litton*.

In *South Central Power Co. v. International Brotherhood of Electrical Workers*, 186 F.3d 733 (6th Cir. 1999), the Sixth Circuit evaluated the arbitrability of a grievance filed after expiration of a collective bargaining agreement, where some of the facts and occurrences underlying the grievance arose before expiration and some arose after. In light of this

Court's holdings in *Nolde Brothers* and *Litton*, the Sixth Circuit astutely drew the following conclusions:

> (1) If all the facts and occurrences relating to [employee's] termination had arisen prior to the expiration of the Old Agreement, then the parties would be bound to arbitrate, and (2) if none of the facts and occurrences had arisen prior to the expiration of the Old Agreement . . . then arbitration would clearly not be required.

Id. at 739. While true, neither conclusion resolved the issue before the Sixth Circuit. Thus, the court had to engage in the fact-intensive inquiry required by *Litton* before determining whether the grievance was subject to arbitration.

The court rejected South Central's argument that the ***only*** relevant consideration was when the employee was actually terminated and instead recognized that *Litton* "requires a consideration of 'facts and occurrences' beyond the ultimate fact of discharge." *Id.* The court further rejected the Union's interpretation of *Trinidad*, explaining that "[t]o the extent that the Eighth Circuit meant for the term 'any' to reflect the controlling legal standard, we decline to adopt the analysis. . . ." *Id.* at 740. Of course, *Trinidad's* instruction to the trial court was to determine whether the ***relevant facts*** occurred before expiration – not whether ***any fact*** occurred before expiration. Ultimately, the Sixth Circuit determined that a dispute arises under a contract for purposes of postexpiration arbitration "when a ***majority*** of the

material facts and occurrences arose before the expiration of the collective bargaining agreement," but then the court recognized, "[b]ecause these cases are predominately factual in nature, this will necessarily be a case-by-case determination." *Id.* Thus, just like the Eighth Circuit, the Sixth Circuit recognized the fact-intensive inquiry required and the impropriety of adopting a bright line rule under *Litton*.

In *Operating Engineers Local Union No. 3 v. Newmont Mining Corp.*, 476 F.3d 690 (9th Cir. 2007), the Ninth Circuit dealt with a very specific arbitration provision and whether a postexpiration grievance should be arbitrated. The employee falsified a tool request prior to expiration of the CBA but was terminated after the expiration of the CBA. *Id.* at 692. The arbitration provision provided, in relevant part: "[T]he Arbitrator shall determine the question of fact as to the occurrence or non-occurrence of the circumstances upon which the discipline was based." *Id.* The Ninth Circuit did not believe a mere counting of facts and occurrences (or a weighing of the relative importance of pre- and postexpiration facts) was what the *Litton* test required. Instead, the court determined that "the dispute must be arbitrated if the parties agreed to arbitrate those facts or occurrences." *Id.* at 693.

Of course, in the context of the narrow arbitration provision in issue, the Ninth Circuit's conclusion makes perfect sense. The employee's falsification of the tool request and its consequences are "question[s] of fact as to the occurrence or non-occurrence

of the circumstances upon which the discipline was based." *Id.* But, despite its attempt to eschew qualitative evaluation of the facts, the Ninth Circuit explained: "There is no doubt that the alleged falsification is of ***some significance*** in the termination dispute; indeed, it is the primary factual question to be resolved." *Id.* (emphasis added). The court continued: "Even if the termination was a significant part of the dispute, so was the alleged misconduct in falsifying the tool request form. The parties clearly agreed in the CBA to arbitrate the latter issue, and the misconduct occurred, if at all, prior to the expiration of the CBA." *Id.* at 694. Ultimately, important facts giving rise to the dispute occurred before the agreement expired. The Ninth Circuit's conclusion is consistent with the Eighth and Sixth Circuits.

The differences between these courts' interpretations of *Litton* are minor. One case finds that the "relevant" facts are important, while another case finds that the "material" facts are important, while the last case finds that the pre-expiration facts must be of "some significance" but ultimately the dispute should be arbitrated if the parties agreed to arbitrate the facts and circumstances involved. Each of the circuit courts properly recognized the highly fact-sensitive nature of the *Litton* test and applied it to the facts and circumstances before it. There is no split among the circuits for this Court to resolve. The Petition should be denied.

CONCLUSION

Pursuant to Supreme Court Rule 10, this case does not present any "compelling reason" for this Court to grant the Petition for Writ of Certiorari. The Tenth Circuit's decision accords with the long-standing precedent regarding arbitral jurisdiction that this Court recently rearticulated in *Stolt-Nielsen*. Moreover, to the extent *Litton* even applies to this case, which involves a promissory note lacking an expiration provision, the Tenth Circuit's decision properly applied *Litton*. Finally, there is no circuit split regarding application of *Litton* for this Court to resolve. Mr. Hicks respectfully requests the Court deny the Petition for Writ of Certiorari.

Respectfully submitted this 8th day of July, 2010.

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